In The

Supreme Court of the United States

October Term 1976

No. 76-706

MARITIME TERMINALS, INC. AND
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

DONALD D. BROWN AND
VERNIE LEE HARRIS AND
THE SECRETARY OF LABOR, AND
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Maritime Terminals, Inc. and Aetna Casualty and Surety Company respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 26, 1976.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals sitting *in banc* decided August 26, 1976 affirming the decisions of the Benefits Review Board by an equally divided court, has not been officially reported but is printed as Appendix A hereto (A. 1). The majority and dissenting opinions of a three Judge panel of the Court of Appeals, reversing the decisions of the Benefits Review Board, is reported at 529 F.2d 1080 (4th Cir. 1975) and is printed as Appendix B hereto (A. 17). The Decisions of the Benefits Review Board in these cases are reported at 1BRBS 212 (***Brown*** case) and 1 BRBS 301 (*Harris* case) respectively and are printed at Appendices C and D hereto (A. 62 and 67). The Decisions and Orders of Administrative Law Judges Thomas Howder (*Harris* case) and Judge *Capps* (Brown case) are unreported and are printed as Appendices E and F respectively (A. 72 and 82). Also printed as Appendix G (A. 94) is an opinion of the United States Court of Appeals for the Second Circuit which has not yet been officially reported but which is relevant to this case.

JURISDICTION

The order sought to be reviewed is the opinion and judgment of the United States Court of Appeals for the Fourth Circuit dated August 26, 1976 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

QUESTIONS PRESENTED

(1) Whether federal compensation coverage under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act extends to terminal employees who are not directly involved in loading or unloading

ships and who are injured on shore while handling cargo and loading or unloading containers or operating vehicles on the terminal property.

(2) Whether the injured workers were engaged in "maritime employment" within the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, as 33 U.S.C. §902(a) at the time of their respective injuries.

(3) Whether Petitioner, Maritime Terminals, Inc., none of whose employees work in whole or in part seaward of the waters edge, is an "employer" within the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, provides in pertinent part:

"Sec. 902. When used in this Act—

* * *

(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine rail-

way, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

* * *

Sec. 903(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building vessel). No compensation shall be payable in respect of the disability or death of

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

* * * *

STATEMENT OF THE CASE

Maritime Terminals, Inc. (MTI) is a terminal operator and operates Norfolk International Terminals in Norfolk, Virginia, pursuant to a lease agreement with the Virginia Port Authority. As a terminal operator, MTI does not load and unload vessels; in the port of Hampton Roads the actual work of loading and unloading vessels is performed by independent stevedoring companies who contract directly with the vessel owners.

MTI, as a terminal operator, performs various services including: loading and unloading of trucks and rail cars,

stuffing (loading) and stripping (unloading) of containers; long and short term storage of goods, etc., and functions essentially as a warehouseman. When cargo is taken off a ship by employees of one of the independent stevedoring companies, it is taken by any employee of the stevedore to a designated point on the premises of Norfolk International Terminals. Depending upon the nature of the cargo, this designated point may be in a warehouse or in a container storage or marshaling yard. After the cargo reaches this designated point it becomes the responsibility of MTI (the terminal operator) and employees of MTI then moves the cargo to a short or long term storage area, load it into trucks or rail cars, etc. In an export situation the reverse procedure is followed.

The designated point referred to in the above discussion is described by industry practice and tariffs as the "point of rest." The Norfolk Marine Terminal Association Tariff[1] defines this point as follows:

> The term "point of rest" means a point within a terminal where the terminal operator designates that cargo or equipment be placed for movement to or from a vessel.[2]

As a terminal operator, MTI only handles cargo on the landward or shore side of the point of rest and no employees of MTI are ever engaged in the movement or handling of cargo on the seaward side of the point of rest.

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[1] Item 290, NMTA Tariff No. 1-D, Respondents Exhibit 1, *Harris* hearing. The NMTA Tariff is a published tariff approved by the Federal Maritime Commission. See 46 C.F.R. §533.1 et seq.

[2] The "point of rest" is also defined by regulations issued by the Federal Maritime Commission where the duties and responsibilities of terminal operators are discussed. 46 C.F.R. §533.6.

The Injury To Donald D. Brown

Donald D. Brown was working in a warehouse on the premises of Norfolk International Terminals (NIT) on May 9, 1973, and he was employed by MTI as a forklift (or tow-motor) driver. Sometime prior to May 9, certain cartons of cotton piece goods and barrels of chemicals were delivered to Norfolk International Terminals by either truck or rail and placed into storage. On May 9, Brown and four other men, a "stuffing gang," began to "stuff" or load the cotton piece goods and barrels of chemicals into a container.[3] Brown as a forklift driver would pick up the cargo from the place where it was stored on the warehouse floor and then place it in the container. This particular warehouse was stipulated to be 850 feet from the waters edge. At no time was Donald Brown required to go on board ship in connection with his duties. After about 2½ hours of operating the forklift in and out of the container, Brown became nauseated from exhaust fumes and suffered carbon monoxide poisoning.

After being loaded with cargo the container was sealed and the necessary paper work was completed. A terminal driver operating a special trucklike vehicle called a "hustler" then carried the container to a marshaling area adjacent to the pier. The container was then lifted from the chassis by other terminal employees and placed in a stack configuration with other containers to await the arrival of a vessel. At the time of Brown's injury the vessel onto which the container was to be loaded was not at the pier, and the vessel in question, the MEINE EXPRESS, did not arrive until May 10, 1975 on which date the container in question was loaded aboard.

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[3] A container is a large steel rectangular box, similar to the rear portion of a tractor trailer into which smaller crates, boxes, barrels, etc. can be placed for shipment.

Neither Brown nor any other employees of MTI participated in loading the container in question aboard the MEINE EXPRESS; rather this work was done by stevedores who work under contract with the shipowner. Employees of the stevedoring company picked up the container from the marshaling area where it had been left by the terminal driver and moved the container using a "hustler" to the ship's side where it was picked up by a large crane and lifted aboard ship. Once aboard ship the container was lashed down (secured) by employees of the stevedoring company.

The Injury To Vernie Lee Harris

Vernie Lee Harris was working as a driver for Maritime Terminals at the time of his injury on July 3, 1973. On that date he was operating a "hustler" vehicle on the terminal premises when the steering or braking mechanism on the vehicle malfunctioned resulting in a collision with a parked container. On the day in question Harris was engaged in moving containers from the long term container storage area to the container marshaling area adjacent to the pier. Just prior to the time of the accident, Harris had deposited a container in the marshaling area and the accident occurred while he was returning to the long term container storage area to pick up another container.

At the time of the accident no ship was present at the pier and the containers in question were not to be loaded aboard a vessel until later in the day. When a ship arrives the containers are picked up from the marshaling area by longshoremen who are employed by an independent stevedoring company. The employees of the stevedore then transport the containers from the marshaling area to the ship's side where

the containers are loaded aboard the vessel by means of a large crane.

Harris' duties as a driver for MTI consisted of moving containers around the terminal facility in order that they may be properly positioned on the terminal premises for various activities including: delivery to the stevedoring companies for loading aboard vessels, inspection by customs, stripping (unloading) or stuffing (loading), delivery to inland carriers (truck or rail), or long term storage.

Harris, like other terminal employees, was not required to work aboard ship or to the seaward side of the point of rest.

Following their respective industrial accidents, both Brown and Harris were paid benefits pursuant to the provisions of the Virginia Workmen's Compensation Act. Subsequently, MTI and its insurance carrier were notified by the local Deputy Commissioner of the United States Department of Labor that both Brown and Harris were taking the position that they were entitled to be paid benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA or the Act). Both cases were referred to Administrative Law Judges of the Department of Labor for hearings and the Law Judges held that both Brown and Harris were engaged in "maritime employment" at the time of their injuries and thus each was an "employee" within the meaning of the Act. (Appendices E and F) [A. 72 and 82]. Appeals were taken to the Benefits Review Board, also in the Department of Labor and the Board, in separate opinions, affirmed the decisions of the Administrative Law Judges (Appendices C and D). [A. 62 and 67]. Timely petitions for Review were filed in order to appeal the Board's decisions to the United States Court of Appeals for the Fourth Circuit.

These cases were consolidated for purposes of briefing and oral argument in the Fourth Circuit and they were initially heard by a three Judge panel consisting of Chief Judge Haynsworth and Circuit Judges Winter and Craven.[4]

The three Judge panel in a two-to-one decision reversed the Benefits Review Board decisions holding that while both respondents Brown and Harris met the situs test of the Act (as amended),[5] neither man was engaged in "maritime employment" since "the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship." 529 F.2d at 1088 (A. 33). Judge Craven dissented holding in essence that Brown and Harris were covered under the Act because they were in his opinion "engaged in the overall process of loading and unloading ships . . . and were injured in the process of loading or unloading a ship while upon navigable waters." 529 F.2d at 1101 (A. 60).

Rehearing *in banc* was granted by the Fourth Circuit and these cases together with *Adkins,* supra. n. 3 were reheard by the full court which at the time consisted of six judges. Judges Haynsworth and Winter, joined by Judge Russell, indicated that they continued to adhere to the views expressed in the panel opinion and would reverse the Benefits

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[4] At the same time the present cases were argued the Court heard argument in the cases of *ITO Corp. of Baltimore,* et al v. *William T. Adkins,* et al., No. 75-1051 and *National Association of Stevedores,* et al v. *William T. Adkins,* et al., No. 75-1088 and subsequently a joint opinion was entered by the Fourth Circuit in the present cases, as well as *Adkins.*

[5] 33 U.S.C. 903(a). The court stated: "We have no doubt that each of the claimants satisfied the situs test of the post-1972 Act. As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel." 529 F.2d at 1083-84; (A. 24).

Review Board's decisions relating to respondents Brown and Harris. However, Judge Craven, joined by Judge Butzner, indicated his continued adherence to the views expressed in his dissenting opinion and would affirm the Benefits Review Board Decisions. Judge Widener, while indicating that he "subscribes to the principle" expressed in the majority panel decision, nevertheless joined with Judges Craven and Butzner in voting for affirmance of the Benefits Review Board, insofar as respondents Brown and Harris were concerned, though for somewhat different reasons.[6] (A. 4). Thus, the Fourth Circuit affirmed the decisions of the Benefits Review Board by an equally divided Court.

REASONS FOR GRANTING THE WRIT

This Petition brings before the Court an important question involving the interpretation of the coverage provisions of the Longshoremen's and Harbor Workers Compensation Act, as amended in 1972. This is a question of federal law which has not been, but should be, settled by this Court. Moreover, there is considerable conflict and divergence of opinion between the judges of the United States Court of Appeals for the Fourth Circuit with regard to the legal standards to be applied in determining whether an injured worker is engaged in "maritime employment" so as to bring within the coverage provisions of the LHWCA. This is evidenced by the fact that the present case was affirmed by an equally divided Court.

[6] The *Adkins* appeal, supra n. 4 was also reheard, and consolidated for argument, with the cases involving respondents Brown and Harris; however, Judge Widener, unlike Judges Butzner and Craven, felt that Adkins was not covered under the Act and insofar as the *Adkins* appeal was concerned, Judge Widener voted with Judges Haynsworth, Winter and Russell to reverse the decision of the Benefits Review Board. Judge Widener's views as to coverage and the factual differences between Adkins, Brown and Harris are discussed in detail, *infra*.

In addition, those Courts of Appeals which have considered this same issue[7] are in direct conflict with regard to what extent shoreside workers are covered under the LHWCA for injuries suffered while handling cargo either prior to or subsequent to the time the cargo is loaded aboard or discharged from a vessel.

The importance of the questions presented in the instant case is underscored by the fact that the Fourth Circuit granted rehearing *in banc* and this fact was acknowledged by the Fourth Circuit when it stated that the rehearing was granted because of "the importance and novelty of the questions decided." (A. 4).

Similarly the Second Circuit in *Pittston Stevedoring Corp.*, et al v. *Dellaventura,* et al (Appendix G) (A. 94) and the First Circuit in *Stockman* v. *John T. Clark & Son, Inc.*, et al, supra n. 6 have acknowledged in no uncertain terms the need for resolution by this Court of the conflicting opinions with regard to coverage. Judge Friendly in *Dellaventura* stated that the four consolidated cases in that proceeding:

[7] Aside from the present case involving respondents Brown and Harris, and the companion case of *ITO Corp. of Baltimore,* et al v. *Adkins,* et al, the following decisions interpreting the coverage provisions of the LHWCA have been handed down to date. In several of the cases Petitions for Certiorari have been filed with this Court:

Weyerhauser Corp. v. *Gilmore,* 528 F. 2d 957 (9th Cir. 1976) *petition for cert. pending* (No. 75-1620)

Delleventura, et al v. *Pittston Stevedoring Corp.*, et al F.2d, , 1976 A.M.C. 881 (2nd Cir. 1976), *pet. for cert. pending* Nos. 76-444 and 76-454.

Jacksonville Shipyards, Inc., et al v. *Perdue,* et al (5 cases), 539 F.2d 533 (5th Cir., September 29, 1976). *Pet. for cert. pending* No.

Sea Land Service, Inc., et al v. *Wallace Johns,* et 540 F.2d 629 (3rd Cir. August 5, 1976).

Stockman, et al v. *John T. Clark & Son,* et al, 539 F.2d 264 (1st Cir., July 27, 1976) *pet. for cert. pending* (No. 76-571).

> . . . present a question of considerable importance . . . Given the importance of the question, the number of Courts of Appeals endeavoring to find an answer and the divergence of opinion already manifest, it seems unlikely that the opinion of any Court of Appeals will be the last word to be said. (A. 97).

Likewise, the First Circuit in *Stockman* acknowledged that the case presented "a difficult question of interpreting the 1972 Amendments" and stated that this difficulty arose from "the essential ambiguity of the 1972 Amendments insofar as they describe or fail to describe the employees for whom coverage is afforded." 539 F.2d at 265. The First Circuit further observed that "judicial decisions to date construing the 1972 Amendments reflect a sharp difference of opinion over the reach of the Act." *Id.* at 268.

In *Sea-Land Service, Inc.* v. *Wallace Johns,* et al, supra n. 6 the Third Circuit remanded a case dealing with similar coverage questions to the Benefits Review Board because it felt an insufficient record had been developed at the administrative level. However, in remanding the case, the Third Circuit expressed its views regarding the legal criteria to be applied in deciding coverage questions under the Act, but the Court felt interpretation of the coverage provisions of the Act was "a task of no little difficulty as several diverging opinions demonstrate" 540 F.2d at 634, and further stated: "(W)e concede, as we must, that the draftsmanship of the 1972 Amendments leaves something to be desired and to a certain extent obscures this purpose from view." *Id.* at 638.

In summary, those Courts of Appeals which have dealt with questions relating to coverage under the 1972 Amendments to the LHWCA have recognized the fact that the issues are important ones and the fact that several cases involving coverage questions are pending before this Court

and many of the Circuit Courts is indicative of the fact that a resolution of such issues is extremely difficult. Moreover, because of the divergence of opinion amoong the Circuits, a failure on the part of this Court to resolve these questions will result in further confusion and uncertainty among the Courts of Appeals and at the administrative level. In addition, because it is very difficult to obtain a stay of compensation orders pending review in the Court of Appeals[8], employers and insurance companies, including the petitioners in the present case, have been forced to pay considerable sums in compensation payments to shoreside workers in questionable cases. These are sums which in all probability cannot be recouped by the employers and carriers concerned, even if this Court should decide that the workers involved were not entitled to receive federal compensation benefits.

In amending the LHWCA in 1972, it is unquestioned that Congress intended to extend coverage under the LHWCA to certain shoreside workers. The legislation was to some degree a congressional response to this Court's decision in *Nacirema Operating Company, Inc.* v. *Johnson,* 396 U.S. 212 (1969). In *Nacirema* this Court reviewed in considerable detail the LHWCA as it existed prior to 1972 and held that the LHWCA did not cover longshoremen who happened to be injured on the pier even though by the ship's gear, i.e., they must be injured on navigable waters.

This Court went on to note that Congress had chosen the approach of "separating water from land at the edge of the pier. . . (and) the invitation to move that line landward

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[8] 33 U.S.C. §921(c) provides in pertinent part:

> The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Court. No stay shall be issued unless *irreparable injury* would otherwise ensue to the employer or carrier. (emphasis supplied)

must be addressed to Congress and not to this Court.", 396 U.S. at 224.[9]

Congress accepted this invitation and accomplished its purpose by expanding the LHWCA definition of "navigable waters" to include a pier, terminal or other adjoining area customarily used to load and unload vessels. In order, however, to avoid covering under the LHWCA anyone who was injured on terminal premises or other areas adjoining navigable waters, Congress imposed the new and additional restriction that claimants would not be covered unless they are "engaged in maritime employment" (1972 Amendments quoted 529 F.2d 1080, (4th Cir. 1975). It is therefore obvious from the statute itself that Congress did not intend to extend coverage to all persons employed at the terminal; rather Congress contemplated some dividing line based upon employment function. This line is not articulated in the statute and the problem or question which must be addressed is to what classes of shoreside workers or how far ashore did Congress intend to extend coverage.[10]

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[9] The background of the 1972 Amendments including a discussion of various compromises reached in view of the competing interests involved is discussed in some detail in Gorman, The Longshoremen's and Harbor Workers Compensation Act—After the 1972 Amendments, 6 Jour. Mar. L and Comm. 1 (1974); and Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers Compensation Act, XLI, Ins. Counsel Jour. 63 (1974).

[10] In petitioners view (a view supported by the majority panel opinion in the present case) the legislative history contained in identical House and Senate Committee reports is helpful in ascertaining Congress' intent. The Committees noted their belief that "the compensation payable to a longshoreman . . . should not depend upon the fortuitous circumstances of whether the injury occurred on land or over water" and it was further stated that it was the intent of Congress to provide benefits to employees "*who would otherwise be covered by this Act for any part of their activity,*" H.R. Rep. 92-1441 at p. 10-11; 1972 U.S. Code Cong. and Admin. News at 4708. The relevant portions of the Committee reports are quoted in the majority panel opinion in the present case, 529 F.2d at 1086 n. 3 (A. 29-30).

Whether the legislative history is helpful or should be referred to at all in ascertaining Congressional intent has been a point of considerable controversy. *Compare Dellaventura* (Appendix G) (A. 94) and the majority panel decision below (A. 3), (legislative history helpful) *with* Judge Craven's dissent below (A. 34) (legislative history should not be referred to) and *Johns,* supra n. 6 (legislative history ambiguous). Moreover, even the courts which have found the legislative history helpful have reached differing results. *Compare Dellaventura with* the majority panel decision below.

The Judges of the United States Court of Appeals for the Fourth Circuit, as well as the Judges of the other Courts of Appeals who have dealt with this problem, have articulated sharply conflicting views with regard to the coverage question; moreover, the legal basis for the various views varies greatly from Judge to Judge.

In the original panel decision in this case, Judges Winter and Haynsworth found that respondents Brown and Harris were not covered under the LHWCA even though each performed a function in the overall loading of a ship 529 F.2d at 1081 (A. 19).

In construing the term "maritime employment", Judge Winter stated that the term "is a phrase which embodies the concept of a direct relation to a vessel's navigation at commerce" Id. at 1084 (A. 24). Judges Winter and Haynsworth found the legislative history of the Act as contained in identical House and Senate Committee reports, supra n. 7, to be explicit in delineating the portion of the overall loading and unloading process during which coverage attaches to longshoremen and persons engaged in longshoring operations," 529 F.2d at 1087 (A. 31), and in their opinion it was Congress' intent to "provide benefits to employees *'who would otherwise be covered by this Act for part of their activity'*" (emphasis in original). The contention ad-

vanced by respondents as well as the government, that all persons, excluding clerical employees, who play "any part in the overall loading and unloading process are covered by the Act as amended" was rejected. *Id.* at 1088 (A. 33). They held, and we believe correctly, that it was the intent of Congress that

> . . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in (such) loading or unloading functions'. *Id.*

In the case of respondents Brown and Harris, "the marshaling area adjacent to the pier was the last point of rest in the loading process . . . and since (they) were injured landward of the last point of rest" neither was covered. *Id.* at 1087-88 (A. 32).

On rehearing Judge Russell joined with Judges Haynsworth and Winter and approved the foregoing, which has come to be known as the "point of rest" doctrine. This view of the law has also been approved by Judge Lumbard of the Second Circuit in his dissenting opinion in *Pittston Stevedoring Corp.,* et al v. *Dellaventura,* et al, supra n. 6.

Judge Craven, joined by Judge Butzner on rehearing, in dissenting from the views of Judges Winter and Haynesworth, expressed the view that respondents Brown and Harris, as well as claimant Adkins, were covered since, in Judge Craven's opinion, Brown, Harris and Adkins[11] were

[11] The facts surrounding Adkins' injury are set forth beginning at 529 F.2d at 1082 (A. 20). In summary, Adkins was a forklift operator who was injured while moving a load of brass tubing from its storage place in a warehouse to a waiting delivery truck. The tubing had arrived at the terminal some seven days before, and after having been stripped (unloaded) from a container, it was stored to await ultimate truck transportation inland. As noted previously, the Fourth Circuit by a four-to-two vote, reversed the Benefits Review Board's decision holding that Adkins was entitled to receive federal compensation benefits.

handling waterborne cargo and were engaged in the overall process of loading and unloading ships. Presumably under this view regular terminal workers who have any connection, no matter how remote, with merchandise which at some time in the past arrived on a ship or which will in the future depart on a ship, are covered under the LHWCA, as amended.

Judge Widener on rehearing *in banc* in the instant case, indicated that he subscribed to the principle expressed by Judges Winter and Haynsworth, but he defined the dividing point between coverage and noncoverage somewhat differently. In Judge Widener's opinion, respondents Brown and Harris were covered because the cargo which the men were handling "was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded aboard ship." (A. 5). Judge Widener reached this conclusion despite the fact that Brown and Harris' involvement in the loading process was at most indirect. However, Adkins, who was moving cargo (on the terminal premises) into a waiting truck was not covered in Judge Widener's opinion because at that point the unloading process (from the vessel) had ceased, and the cargo was being loaded into a truck rather than being unloaded from a vessel.

The decisions of panels of the First, Second, Third and Fifth Circuits also reveal divergent views. Judges Friendly and Oakes of the Second Circuit in *Delleventura,* supra held that coverage under the LHWCA, as amended, extends to persons meeting the situs requirement who are:

(1) engaged in stuffing and stripping containers, or

(2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier, *provided* in the latter instances that the employee has spent a significant portion of his time in the typical longshoring activity of taking cargo off a vessel.

Under this test, Brown would presumably be covered; however, because Harris, as a terminal employee, did not spend a *significant part of his time* taking cargo off a vessel, his status is less clear and he would perhaps not be covered under the Second Circuit's test of coverage. Judge Lumbard dissented in *Delleventura* and stated that he adhered to the "point of rest" doctrine espoused by Judges Winter and Haynsworth in the panel decision in the instant case. In Judge Lumbard's opinion, neither Brown nor Harris are covered under the LHWCA, as amended.

While the Second Circuit felt that an employee's general duties, as opposed to his duties at the time of his injury, were a factor to be considered, consideration of such factors in deciding coverage questions was rejected in the Fifth Circuit's decision in *Jacksonville Shipyards, Inc.*, et al v. *Perdue,* et al. supra n. 6 wherein a two judge panel of that court (Judges Tuttle and Tjoflat) decided in a single opinion five cases (three cases involved shipyard workers and two cases involved cargo handlers). The Fifth Circuit rejected the "point of rest" theory advanced by the Fourth Circuit and stated that in determining whether a worker is covered one must look initially to see if the situs is one customarily used for loading, repairing, etc. of a vessel. If the situs requirement is met then coverage under the LHWCA attaches if the injured worker at the *time of his injury* was (1) performing the work of loading, unloading, repairing,

etc. a vessel, or (2) although not actually carrying out such functions was "directly involved" in such work, 539 F.2d at 539-40. The Court held that two cargo handlers, Ford and Bryant, who were securing cargo on a rail car and working in a warehouse respectively were covered because their work was an integral part of the ongoing process of moving maritime cargo between land transportation and a ship." 539 F.2d at 543-44. However, the Court held that two shipyard workers whose normal duties took them aboard ship were not covered, though injured at marine facilities, because the areas in which they were injured were not ones which were customarily used for building or repairing a ship. It appears that under the Fifth Circuit's test, Brown, Harris and Adkins would be covered.

A panel of the Third Circuit indicated in remanding the case of *Sea-Land Services, Inc.*, et al v. *Johns,* et al, supra n. 6 that they were in essential agreement with the views of Judge Craven (and Judge Butzner) in the instant case, but they expressed their test of coverage somewhat differently. In the Third Circuit's view federal coverage is to be afforded all employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel and vice versa in the discharging phase, 540 F.2d at 638-39. The Court quite candidly admitted that its test tended to read the situs requirement (a requirement deemed to be of considerable importance by the Fifth Circuit in *Perdue*) out of the Act. Thus, a truck driver injured in a vehicular accident while transporting a container destined ultimately for a vessel could, in the Third Circuit's view, be entitled to federal benefits even though the accident occurred on city streets outside the marine terminal gate.

The First Circuit's decision in *Stockman,* et al v. *John T.*

Clark & Son, et al, supra n. 6 dealt with a worker who, like respondent Brown, was injured while stripping a container. The Court declined to follow the "point of rest" test of coverage advanced by Judge Winter in the present case (and by Judge Lumbard in his dissent in *Dellaventura*), but rather was persuaded by Judge Friendly's views in *Dellaventura* regarding the interpretation to be given the coverage provisions of the Act. But the Court in *Stockman* was clearly troubled by the statements in the congressional reports which indicate "that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees" and the Court in its holdings states the following caveat:

> We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act . . . 539 F.2d at 276.

Since respondent Brown, like Stockman, was engaged in stuffing a container, the First Circuit would presumably afford coverage to him. However, since no employees of MTI were covered for any part of their activity under the Act as it existed prior to the Amendments (since no employees of MTI are now, or were at any time, required to work aboard ship), then it is possible that given the foregoing that the First Circuit would hold that neither Brown nor Harris were covered under the Act, as amended.

The conflicts between and within the Courts of Appeals are not limited to the basic tests of coverage under the Act, as amended, for there has been no agreement among the Circuits as to legal standards or authorities to be applied in deciding the coverage questions. These disputes include:

(1) Whether the presumption contained within the Act, 33 U.S.C. §920, is entitled to any weight[12];

(2) Whether great deference is due the decisions of the Benefits Review Board which have construed the coverage provisions of the Act[13];

(3) Whether the legislative history of the Amendments should be referred to[14];

(4) Whether the legislative history is clear or so ambiguous as to be meaningless[15];

(5) Whether the U. S. Department of Labor is a proper party to an appeal and if so, which entity within the Department.[16]

Given the disparate views of the Judges of the several Courts of Appeals which have considered the coverage question, we submit that now is an appropriate time to adopt the suggestion of several of the courts and grant certiorari in this case and the other cases now pending which present similar coverage questions. Only a definitive decision by this Court can clear up the confusion and uncertainty which surrounds the 1972 Amendments to the LHWCA.

Congress has manifested its understanding that somewhere between the ship's side and the terminal gate there is a breakpoint in function between those workers regu-

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[12] *Compare* Judge Craven's dissent in the instant case, 529 F.2d at 1091, *with Stockman,* supra at 269 and Dellaventura, supra at A. 94.

[13] *Compare* Judge Cravan's dissent in the instant case, 529 F.2d at 1091-94 *with Stockman,* supra at 269 and Dellaventura at A. 94.

[14] See Note 9 supra.

[15] See note 9 supra.

[16] *Compare* the instant case A. 1 *with Dellaventura.* A. 94. n. 5 and *Perdue,* 539 F.2d at 546.

larly employed on the terminal (1) who are longshoremen, i.e. workers directly engaged in loading and unloading ships and those (2) who are warehouse workers or others performing normal land based functions involved indirectly, if at all, with ship's activity. The Committee reports indicate that this division of function shall have a legal, as well as a practical, application. The dividing point between the stevedoring function on the one hand (ship's service employment) and the terminal or warehousing operation is the "point of rest."

It is at the point of rest that one category or group of waterfront workers' labors are complete and the labors of another group of workers begin. This concept which was recognized by Judges Haynesworth, Winter and Russell in the instant case, is a concept with which the industry is thoroughly familiar and which lends itself to a practical interpretation and application of the coverage provisions of the LHWCA, as amended.

CONCLUSION

For the reasons stated above, we respectfully urge the Court to grant certiorari and reverse the decisions below.

Respectfully submitted,

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